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No. 87-365

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BRIAN CLEWER, INC.,

Petitioner,

v.

PAN AMERICAN WORLD AIRWAYS, INC.,
TRANS WORLD AIRLINES, INC.,
BRITISH AIRWAYS Plc,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION

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STATEMENT PURSUANT TO RULE 28.1

The parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of respondents are as follows:

British Airways Plc

- Airline Tariff Publishing Company
- Air Mauritius Ltd.
- The Airplus Company Ltd.
- Alta Holidays Ltd.
- Beau Vallon Properties Ltd.
- Belfast Europa Ltd.
- Brussels Europa Societe Anonyme
- Eupo-Air Holdings Ltd.
- Eupo-Air Travel Services Ltd.
- GB Airways Ltd.
- Holts Paris Welcome Service S.A.
- IAL Caribbean Ltd.
- Isotal (Imobiliaria Do Sotavento Do Algarve)
- Karsy Walk Inn Ltd.
- Kenya Safari Lodges & Hotels Ltd.
- Los Angeles Technical Services Corp.
- Mosside Enterprises Ltd.
- Penta Hotels N.V.
- The Plimsoll Line Ltd.
- San Francisco Foreign Flag Carrier Corp.
- Sun Resorts Ltd.
- Tourism Promotion Services (Kenya) Ltd.
- Tourism Promotion Services (Uganda) Ltd.
- Travel Automation Services Ltd.

Pan American World Airways, Inc.

- Aeronautical Radio, Inc.
- Air Cargo, Inc.
- Airline Tariff Publishing Company
- Escola Americana de Rio de Janeiro
- Honolulu Fueling Facilities Corporation
- International Aeradio (Caribbean) Ltd.
- Liberian Development Corporation
- Manhattan Air Terminal, Inc.
- Nigerian Aviation Handling Co.
- Pan Am Corporation
- Promotora de Hoteles de Turismo Medellin, S.A.
- Radio Aeronautica Paraguaya, S.A.
- Social Immobiliaria Norteamericana, S.A.
- Societe de Tourisme et Representation
- Societe International de Telecommunications Aeronautiques

Trans World Airlines, Inc.

- Aero Limited Partnership

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION

Contrary to the arguments made in the petition for certiorari, this case does not raise questions concerning the application of technical pleading rules. The complaint was dismissed not because essential allegations were omitted from the complaint, but because it was found that petitioner was not a consumer or competitor in the relevant market and that the injury alleged by petitioner was derivative of an injury suffered by a competitor in the relevant market that had already vindicated its and the public's interest in en-

forcement of the antitrust laws. Amendment of the pleadings could not change these dispositive facts and conclusions.

Put differently, the question presented by this case is whether the petitioner travel agent has antitrust standing to seek treble damages for injuries purportedly sustained as a result of an alleged conspiracy among the respondent airlines to eliminate a competing airline.

Using the analysis mandated by the Court in *Associated General Contractors, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519 (1983), both the District Court and the Ninth Circuit concluded without dissent that petitioner lacks antitrust standing. That decision was inescapable after a consideration of the factors identified in *Associated General Contractors*. The factual and legal basis of that decision could not be affected by any consistent amendment. This case presents no novel or significant issue for the Court to decide. The petition should be denied.

STATEMENT OF THE CASE

This action is one of four antitrust suits growing out of the collapse of Laker Airways Limited ("Laker") in February 1982. Each suit has been predicated on the same alleged conspiracy to eliminate Laker as a competitor in air transportation between the United States and the United Kingdom. This suit—particularly when considered in light of these related litigations—is a perfect example of why Congress did not intend to allow every person tangentially affected by an alleged antitrust violation to maintain an action to recover treble damages. *Blue Shield* v. *McCready*, 457 U.S. 465, 477 (1982).

The first suit was brought by Laker itself in the United States District Court for the District of Columbia against ten airlines, an aircraft manufacturer, and its financing subsidiary ("*Laker I*").[1] This suit was settled on October 1, 1985. *See Adams* v. *Pan Am. World Airways, Inc.*, 640 F. Supp. 683, 684 (D.D.C. 1986).

The second litigation, consisting of a number of consolidated class actions, was brought by passengers who claimed that, as a result of the alleged conspiracy, they were forced to pay higher fares for U.S./U.K. air transportation than they would have paid if Laker had remained in the market ("*Laker II*").[2] Judge Harold H. Greene approved the settlement of these claims on March 18, 1986. *See* 640 F. Supp. at 684 n.5.

After the first two actions were settled, Laker's counsel brought yet another suit on behalf of 313 former employees of Laker against all of the defendants in *Laker I* plus two additional airlines.[3] The District Court for the District of Columbia dismissed the employees' suit on June 30, 1986, for lack

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[1] *Laker Airways Ltd.* v. *Pan Am. World Airways, Inc.*, No. 82-3362 (D.D.C. filed Nov. 24, 1982); *Laker Airways Ltd.* v. *Sabena, Belgian World Airlines*, No. 83-0416 (D.D.C. filed Feb. 15, 1983); *Laker Airways Ltd.* v. *Union de Transport Aeriens*, No. 83-2791 (D.D.C. filed Sept. 22, 1983). These three actions were consolidated on November 11, 1983.

[2] *In re North Atl. Air Travel Antitrust Litig.*, No. 84-1013 (D.D.C. filed Mar. 30, 1984).

[3] *Adams* v. *Pan Am. World Airways, Inc.*, No. 86-0304 (D.D.C. filed Feb. 3, 1986); *Clifton* v. *Pan Am. World Airways, Inc.*, No. 86-0629 (D.D.C. filed Mar. 7, 1986). These actions were consolidated on March 13, 1986. *See* 640 F. Supp. at 683 n.1.

of antitrust standing. *Adams* v. *Pan Am. World Airways, Inc.*, 640 F. Supp. 683 (D.D.C. 1986). The Court of Appeals for the District of Columbia Circuit affirmed, on September 1, 1987. *Adams* v. *Pan Am. World Airways, Inc.*, No. 86-5468, slip op. (D.C. Cir.).

The present suit was also brought by Laker's former counsel, after the first two actions were settled. *Brian Clewer, Inc.* v. *Pan Am. World Airways, Inc.*, No. 86-6003 (C.D. Cal. filed Jan. 7, 1986). It was brought on behalf of a Los Angeles travel agent against three of the airlines that have been defendants in each of the other Laker-related actions. *See Adams* v. *Pan Am. World Airways, Inc., supra*, 640 F. Supp. at 684 n.7; petition at 13a. The District Court for the Central District of California dismissed the suit on May 14, 1986, on the ground that petitioner lacks antitrust standing under Section 4 of the Clayton Act, 15 U.S.C. § 15. Petition at 4a-15a.

More specifically, the court performed the analysis mandated by *Associated General Contractors, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519 (1983), and concluded that every one of the four factors noted in that decision required dismissal. The court held that the injury Clewer alleged is "too indirect to provide standing under the Clayton Act," petition at 13a, and "is not the type [of] injury that the antitrust laws were intended to forestall," *id.* at 12a, that the damages Clewer alleged are speculative, *id.* at 14a, and that there is a risk of duplicative recovery against the respondent airlines, *id.*

On February 12, 1987, the Court of Appeals for the Ninth Circuit affirmed. 811 F.2d 1507. The Ninth Circuit based its decision upon each of the several grounds relied upon by the District Court and ex-

plicitly held that Clewer's alleged harm "is derivative of whatever harm may have been suffered by Laker." Petition at 3a. There was no dissent.

Clewer sought rehearing en banc, arguing for the first time that it should be granted leave to amend the complaint.[4] Clewer had waited over five years after its alleged claim arose, a full year after filing its complaint, and after the District Court and the Ninth Circuit had rendered their decisions based upon full briefing and oral argument by both sides before raising this issue. The petition was denied, "no active judge of the court having requested a vote on it." Petition at 18a.

A petition for a writ of certiorari was filed on September 1, 1987.

REASONS FOR DENYING THE PETITION

After the two courts below decided that Clewer lacks antitrust standing to challenge an alleged conspiracy that already has been litigated and settled by two different groups of plaintiffs, Clewer now claims that it was the victim of an improper application of "technical pleading requirements." Petition at 8. Nothing could be further from the truth. Clewer's complaint was dismissed not because it lacked certain required allegations, but because it alleged certain facts—which clever redrafting cannot now erase—that demonstrate Clewer is not a proper party to bring this action. The dismissal of the complaint thus had nothing to do with "luck in drafting the pleadings." Petition at 7. Instead, dismissal was the result of the

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[4] Appellant's Petition For Rehearing and Suggestion For Rehearing En Banc, No. 86-6003 (C.D. Cal. filed Feb. 26, 1987).

routine application of the standards for determining antitrust standing established in *Associated General Contractors*.

Because Clewer's complaint establishes that Clewer's alleged injury is derivative of the injury suffered by Laker, it is "beyond doubt that [Clewer] can prove no set of facts in support of [its] claim which would entitle [it] to relief." *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). Dismissal of Clewer's complaint was required because Clewer is not a proper party to bring an antitrust suit challenging the conduct alleged in the complaint.

The allegations in Clewer's complaint are largely identical to those made in the three other Laker-related actions. In essence, each suit alleged that the defendant airlines engaged in a conspiracy to eliminate Laker from the U.S./U.K. air transportation market. Petition at 13a. In the first two suits, the plaintiffs were participants in the market in which the conspiracy allegedly operated. In *Laker I*, Laker was a competitor in the relevant market. *Adams* v. *Pan Am. World Airways, Inc., supra*, 640 F. Supp. at 683-84; petition at 3a. In *Laker II*, the passengers were consumers in the relevant market. 640 F. Supp. at 685. In this suit, however—as in the employees' suit—the plaintiff was affected, if at all, only indirectly by the alleged Laker conspiracy and is not a proper party to vindicate the alleged violations of the antitrust laws.

Clewer, a travel agent that received commissions for selling tickets on Laker, claims it was injured as a result of the alleged conspiracy among international airlines to eliminate Laker. Petition at 21a-23a. Although Clewer labored to adapt familiar claims made

earlier by Laker and Laker's customers to its own use, as the District Court noted, Clewer's complaint

> "fails to disguise the practical realities of the markets involved: plaintiff's market does not involve national airline companies involved in providing air transportation between the United States and the United Kingdom, but instead involves Southern California ticket sellers involved in merely distributing the tickets of Laker airlines."

Petition at 11a. The Ninth Circuit similarly recognized that Clewer's market "does not involve the production of airline service between the United States and the United Kingdom, but rather is limited to the distribution of airline tickets in Southern California." Petition at 2a.

In short, the District Court and the Ninth Circuit concluded that Clewer was neither a consumer nor a competitor in the market in which trade is alleged to have been restrained. As a travel agent, Clewer was neither a transatlantic airline nor a transatlantic airline passenger. Clewer cannot alter these facts by adding allegations to its complaint, nor would additional allegations lead to any result other than another dismissal of Clewer's claims. Clewer's complaint was dismissed not because of what it lacked, but because of what it alleged: a conspiracy, already litigated by the same counsel, that only indirectly affected Clewer.

Of equal importance, Clewer's complaint was dismissed also on the basis of those factors set forth in *Associated General Contractors* that are not dependent on the specificity of a plaintiff's complaint. The

existence of others more suited to vindicate the public interest in antitrust enforcement does not depend upon Clewer's compliance with any supposed technical rules of pleading. The existence of these persons is evident from the previous lawsuits. Similarly, the risk of duplicative recovery and the complexity in apportioning damages in this case are apparent from these other lawsuits, not from any allegations which Clewer may or may not have made. The speculative measure of Clewer's harm is apparent from Clewer's contractual relation to Laker, not from the absence of specific allegations in the complaint.

In short, the complaint in this action was not dismissed because of Clewer's noncompliance with any "technical pleading requirements." It was dismissed because it appeared beyond doubt from the facts Clewer alleged that Clewer can prove no set of facts that would entitle it to relief. *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957).[5]

As a last resort, Clewer requests leave to amend its complaint in order to "plead sufficient facts to demonstrate a marketwide restraint in the market for the sale of tickets for air transportation between Southern California and the United Kingdom." Petition at 8. This request was made for the first time only after Clewer had twice lost on the motion to dismiss and had failed to avail itself of ample opportunity to amend the complaint. Clewer filed three

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[5] Given that Clewer's claim was not dismissed on the basis of any technical pleading requirements, this would hardly be an appropriate case for the Court to provide "guidance" on such an issue. *See, e.g., Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945) ("[O]ur power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion . . . .").

briefs in the District Court and the Ninth Circuit and twice participated in oral argument, yet did not raise the issue of leave to amend until its request for rehearing en banc, which the Ninth Circuit unanimously rejected.

The proffered amendment, moreover, would change nothing. Pleading these facts would not alter the basic theory of Clewer's suit; they would merely add surplusage to a still-defective complaint. The problem with Clewer's complaint is not the quantum of supporting facts it alleges, but rather Clewer's status vis-a-vis the alleged restraints. Clewer's claim would still be entirely dependent upon proof of a conspiracy directed against Laker. Petition at 2a-3a, 11a-12a. The balance of factors under *Associated General Contractors* would still require dismissal.

Whether amended or not, Clewer's complaint seeks to redress an injury allegedly suffered as a result of a conspiracy to eliminate Laker. Under the principles clearly articulated by the Court, a travel agent indirectly injured by an alleged conspiracy against its principal lacks standing to sue for treble damages under the antitrust laws when the principal and other direct victims have already been compensated. No amendment or construction of the complaint can change the dispositive fact that the conspiracy Clewer alleges was directed at Laker.

CONCLUSION

For the foregoing reasons, respondents request that the Court deny Clewer's petition for a writ of certiorari.

Respectfully submitted,

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